



**DeSoto, Inc.**

ADMINISTRATIVE AND ENGINEERING

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LAW DEPARTMENT

FEDERAL EXPRESS

October 20, 1989

Edward J. Kowalski  
U.S. Environmental Protection Agency  
Office of Regional Counsel  
Region V  
230 South Dearborn St.  
Chicago, IL 60604

Re: Ninth Avenue Dump (the "Site")  
- Unilateral Administrative Order  
Under CERCLA §106(a) Made Effective  
November 6, 1989 (the "Order") and  
- Accompanying Cover Letter from Basil G.  
Constantelos, Director Waste Management  
Div. (the "Notice")

Dear Mr. Kowalski:

This is in response to the Order and Notice referred to above and the invitation in both to comment on this Order and its applicability to DeSoto, Inc. ("DeSoto").

As you are already aware from meetings and correspondence, there are a number of parties to whom the Order was sent (alleged "Potentially Responsible Parties" or "PRPs") that are in the process of forming a representative group (the "PRP Group"). That PRP group is preparing and will be submitting to the USEPA on behalf of all of its constituents comments on the Order. Those comments will address a number of common questions affecting most if not all of the PRPs, relating to both the substance of the remedial program anticipated under the Order and the quality of the evidence relied on by the USEPA to support the assertions of liability against many, if not all of the PRPs. We understand that other PRPs will also be submitting individual comments on the Order.

Please be advised that DeSoto plans to rely on the analyses and comments to be submitted by the PRP group and any other comments that may be submitted relative to the Order, to the extent we may find those comments consistent with DeSoto's position in this matter.

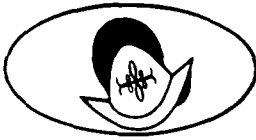
There are, however, some specific points that DeSoto would like to address relating to its inclusion as a Respondent to the Order.

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First, as we have already advised the USEPA in our previous correspondence concerning this matter, we have conducted a thorough search of DeSoto's files and find no record of the shipment, storage, treatment, disposal or other handling of DeSoto's waste materials to, at or through the Ninth Avenue Dump Site in Gary, Indiana. We note, however, that many of DeSoto's records from the early to mid-1970's, including all vendor and accounts payable records, have long since been disposed of in the ordinary course of business.

As we understand it, the primary if not the only source of information the USEPA has concerning any possible involvement by DeSoto at the Site are the vague recollections of the former operator of the Site, Steve Martell, and some other employees at the Site, as reflected in formal, recorded statements the USEPA has obtained from them.

At the September 18, 1987 meeting between the USEPA and the alleged PRPs you clarified that the USEPA's assertions of liability against DeSoto, as well as the other PRPs are premised entirely on the second of two statements given by Steve Martell, on November 21 and 22, 1988 (the "Second Martell Statement"). In other words, those assertions are made without reference to or consideration of Mr. Martell's earlier statement (the "First Martell Statement") or the Statements of other Ninth Avenue Site personnel or other information that is also in the USEPA's possession concerning this Site.

It is our further understanding that the USEPA's conclusions drawn from the Second Martell Statement, which serve as the sole basis for the assertions of liability against DeSoto are summarized in a document captioned "Ninth Avenue Site/U.S. Scrap Site Volumetric Rankings" (the "Tech Law Report") prepared for the USEPA by the Contract Evidence Audit Team of Lakewood, Colorado, bearing a submission date of May 4, 1988 (sic). We have received a copy of the Tech Law Report and have reviewed it as it relates to DeSoto's alleged involvement at the Site. We find some very basic problems with the Tech Law Report and the Second Martell Statement from which it is drawn.





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To begin with, the Second Martell Statement is on its face so vague, self admittedly tenuous and internally inconsistent as to be totally lacking in credibility. In addition, there are gross inconsistencies between the Second Martell Statement and other evidentiary materials that the USEPA has chosen to totally ignore, including, among other things, the statements of other Ninth Avenue Site personnel. That further removes any rational basis for the reliance that has been placed on the Second Martell Statement in asserting liability against DeSoto. (We note further that the First Martell Statement and the statements of other Ninth Avenue Site personnel are equally lacking in credibility for substantially the same reasons.) In summary, there is a total and self evident lack of foundation for any reliance on the Second Martell Statement, and the other statements taken by the USEPA, as well.

Beyond that, some of the conclusions drawn in the Tech Law Report are lacking any clear support even in the Second Martell Statement, on which they are purportedly based, and are directly contradicted by some irrefutable facts that the USEPA has so far conveniently chosen to ignore rather than investigate.

We note, for example, that the Martell Statements are more than a little vague on many of the time periods involved in the matters discussed. Nevertheless, the Tech Law Report attributes certain monthly levels of waste shipments to the Ninth Avenue Site from DeSoto's Kostner Avenue Plant in Chicago for a full three-year period from the beginning of 1973 through the end of 1975. In point of fact, the DeSoto Kostner Avenue Plant was permanently closed in January 1975. Following that closing there were simply no ongoing operations to generate the wastes attributed to the facility for the last 11 months of 1975. In other words, the hazardous waste shipments claimed for the DeSoto Kostner Avenue Plant are overstated by at least 11 of the 36 months worth claimed, or about one-third. We are prepared to provide you whatever evidence you may reasonably request of the DeSoto Kostner Avenue Plant closing in January, 1985. We hereby request the opportunity to do so.





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Finally, we firmly believe that the USEPA's entire approach to determining liability and degrees of involvement at this Site has been arbitrary and capricious, as demonstrated by its arbitrary reliance on only part of the relevant information in its possession and its total refusal to even consider any information or argument presented by Respondents prior to the November 6, 1989 Compliance Date under the Order, as confirmed by you at the September 18, 1989 meeting between the USEPA and alleged PRPs.

Based on all of the foregoing, we respectfully object to both the inclusion of DeSoto on the PRP list for this Site and the level of involvement at the Site that is attributed to DeSoto. On that basis we further object to the inclusion of DeSoto as a Respondent to the Order.

We also hereby reserve all rights to object to the remedial activities anticipated for the Site under the Order.

Very truly yours,



James A. Carney  
Assistant General Counsel

JAC/jc

